THE HON'BLE SRI JUSTICE BILAL NAZKI

AND

THE HON'BLE SRI JUSTICE S.ANANDA REDDY

_

WRIT PETITIONS No. 1478, 1406, 4449,

4553, 4618, 5816, 7852 AND 10184 OF 2004

WRIT PETITION NO : 1478 of 2004

% 27-01-2005

Between:

M/s Nava Bharat Ferro Alloys Limited, "Nava Bharat Chambers", 6-3-1109/1, 3rd Floor, Raj Bhavan Road, Hyderabad - 500 482, rep. by its Executive Director, Mr. P. Trivikram Prasad.

..... PETITIONER

AND

1 The Union of India, rep. by its Secretary, Parliamentary Affairs, New Delhi.
2 The Union of India, Ministry of Finance, rep. by under Secretary to

Government of India, New Delhi.
3 The Superintendent of Central Excise, O/o Assistant Commissioner of

Central Excise, Division-II, Service Tax Cell. Kakinada.
4 The Superintendent of Customs & Central Excise, Bhadrachalam Range,

Sarapaka - 507 128, Khammam District.

.....RESPONDENTS

For the Petitioner : MR.P.SRINIVASA REDDY, Advocate.

For the Respondents : MR.A.RAJASHEKAR REDDY (SC FOR CG)

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> Head Note:

? CITATIONS:

1. 1999(6) SCC 418.
2. AIR 1964 SC 925.
3. AIR 1961 SC 1480
4. AIR 1974 SC 436
5. (2001)4 SCC 60
6. AIR 1990 SC 1637
7. 267 ITR 9

C/15

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

THURSDAY, THE TWENTY SEVENTH DAY OF JANUARY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE BILAL NAZKI

and
THE HON'BLE MR JUSTICE S.ANANDA REDDY

WRIT PETITIONS No. 1478, 1406, 4449,

4553, 4618, 5816, 7852 AND 10184 OF 2004

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Central Excise, Division-II, Service Tax Cell. Kakinada.
4 The Superintendent of Customs & Central Excise, Bhadrachalam Range,

Sarapaka - 507 128, Khammam District.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a Writ or Order or direction more particularly one in the nature of a Writ of Mandamus declaring- that Chapter-V of the Finance Act, 1994 (Central Act) as amended by Finance Act, 1997 and the retrospective and validation provisions in Section 116 and 117 of the Finance Act, 2000 and the Section 158 of Finance Act 2003 in so far as they seek to levy service tax on amounts paid to Goods Transport Operators for carriage of goods by road as ultra vires Entry 56 of List-II of the VII Schedule to Constitution of India and hence unconstitutional; and in any event declare provisions treating entire freight charges as liable to service tax as discriminatory and unconstitutional; and consequently declare that the Petitioner is not liable to pay any service tax as user of Goods Transport Service during the period 16-11-1997 to 2-6-1998.

Counsel for the Petitioner:MR.P.SRINIVASA REDDY

Counsel for the Respondents : MR.A.RAJASHEKAR REDDY (SC FOR CG)

WRIT PETITION NO : 1406 of 2004

Between:

M/s.Sagar Cements Limited, 8-2-472/B/2, Road No.1, Banjara Hills, Hyderabad-500 034, rep.by its Executive Director, Dr.S.Anand Reddy.

..... PETITIONER

AND

1 The Union of India, rep.by its Secretary, Parliamentary Affairs, New Delhi.

2 The Union of India, Ministry of Finance, rep.by under Secretary to

Government of India, New Delhi.
3 The Superintendent of Central Excise, O/o.Superintendent of Central Excise,

Kodada Ranga, Kodada, Nalgonda District.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a writ or order or direction more particularly one in the nature of writ of mandamus declaring; that Chapter-V of the Finance Act,. 1994 (Central Act) as amended by Finance Act, 1997 and the retrospective and validation provisions in Section 116&117 of the Finance Act, 2000 and the Section 158 of Finance Act 2003 in so far as they seek to levy service tax on amounts paid to Goods Transport Operators for carriage of goods by road as ultra vires Entry 56 of List-II of the VII Schedule to Constitution of India and hence unconstitutional; and in any event declare provisions treating entire freight charges as liable to service tax as discriminatory and unconstitutional; and consequently declare that the petitioner is not liable to pay any service tax as user of Goods Transport Service during the period 16-11-1997 to 2.6.1998.

Counsel for the Petitioner:MR.P.SRINIVASA REDDY

Counsel for the Respondents : MR.ARAJASHEKAR REDDY (SC FOR CG) FOR RMAPP.

WRIT PETITION NO : 4449 of 2004

Between:

M/s Kakatiya Cement Sugar & Industries Limited, 1-10-140/1, Ashoknagar, Hyderabad - 500 020 rep.by its Executive Director, Mr.J.S.R.Prasad.

..... PETITIONER

AND

1 The Union of India, rep.by its Secretary, Parliamentary Affairs, New Delhi.
2 The Union of India, Ministry of Finance, rep.by under Secretary to

Government of India, New Delhi.
3 The Superintendent of Central Excise, O/o Superintendent of Central Excise, Kodad Range, Kodada, Nalgonda District.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a Writ or Order or direction more particularly one in the nature of a Writ of Mandamus declaring - that Chapter-V of the Finance Act, 1994 (Central Act) as amended by Finance Act, 1997 and the retrospective and validation provisions in Section 116 & 117 of the Finance Act, 2000 and the Section 158 of Finance Act 2003 in so far as they seek to levy service tax on amounts paid to Goods Transport Operators for carriage of goods by road as ultravires Entry 56 of List-II of the VII Schedule to Constitution of India and hence unconstitutional; and in any event declare provisions treating entire freight charges as liable to service tax as discriminatory and unconstitutional; and consequently declare that the Petitioner is not liable to pay any service tax as user of Goods Transport Service during the period 16-11-1997 to 2-6-1998

Counsel for the Petitioner : MR.P.SRINIVASA REDDY

Counsel for the Respondents : MR.ARAJASHEKAR REDDY (SC FOR CG)

WRIT PETITION NO : 4553 of 2004

Between:

Sree Rayalaseema Alkalies and Allied Chemicals Ltd., Represented by its Vice President (Customs and Excise), Sri M.V.Lakshmi Reddy, S/o.Subba Reddy, Aged 79 Yrs, R/o.Kurnool, Kurnool District.

..... PETITIONER

AND

1 The Union of India, represented by its Secretary, Ministry of Finance, North Block, New Delhi.
2 The Commissioner of Customs and Central Excise, Tirupathi, Chittoor District.
3 The Delputy Commissioner of Central Excise, Kurnool Division, Kurnool.
4 The Superintendent of Central Excise, Range-II, Kurnool, Kurnool District.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue Writ, order or direction, more particularly one in the nature of Writ of Mandamus, declaring the provisions of Sections 68, 70 and 71-A of the Finance Act 2003 requiring the recipient of Goods Transport Services for the period of 16-11-1997 to 2-6-1998 Service Tax from clearing and forwarding agents for the period 16-7-1997 to 15-10-1998 as unconstitutional, illegal and opposed to the Law laid down by the Honourable Supreme Court and to consequently set aside the Notice issued by the 4th respondent vide OC No.918/2003 dated 4-11-2003 and pass such other order or orders.

Counsel for the Petitioner:MR.K.V.UPENDRA GUPTA

Counsel for the Respondents : MR.ARAJASHEKAR REDDY (SC FOR CG)

WRIT PETITION NO : 4618 of 2004

Between:

M/s Sree Rayalaseema Hi Strength Hypo Ltd, Gandiparla, Kurnool, Kurnool District, rep. by its Senior General Manager-cum- Company Secretary, K. Sambasiva Rao s/o China Kotaiah, aged 43 yrs, r/o Hyderabad, Hyderabad District.

..... PETITIONER

AND

1 The Union of India, rep. by its Secretary, Ministry of Finance, North Block, New Delhi.
2 The Commisioner of Customs and Central Excise, Tirupathi, Chittoor

District.
3 The Deputy Commissioner of Central Excise, Kurnool Division, Kurnool.
4 The Superintendent of Central Excise, Range-II, Kurnool, Kurnool District.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue Writ, order or direction, more particularly one in the nature of Writ of Mandamus, declaring the provisions of Sections 68, 70 and 71-A of the Finance Act 2003 requiring the recipient of Goods Transport Services for the period of 16-11-1997 to 2-6-1998 Service Tax from clearing and forwarding agents for the period 16-7-1997 to 15-10-1998 as unconstitutional, illegal and opposed to the Law laid down by the Honourable Supreme Court and to consequently set aside the Notice issued by the 4th respondent vide OC No. 918/2003 dated 4-11-2003.

Counsel for the Petitioner:MR.K.V.UPENDRA GUPTA

Counsel for the Respondents : MR.ARAJASHEKAR REDDY (SC FOR CG)

WRIT PETITION NO : 5816 of 2004

Between:

M/s. Sri Vishnu Cement Limited, No.1, 10th Main, Jeevanbima Nagar, Bangalore-560 075, rep., by its Senior Manager[Finance & Accounts] Mr. T.K. Ramesh.

..... PETITIONER

AND

1 The Union of India, rep., by its Secretary, Parliamentary Affairs, New Delhi.
2 The Union of India, Ministry of Finance, rep., by Under Secretary to

Government of India, New Delhi.

3 The Superintedent of Central Excise, O/o. Superintendent of Central Excise, Kodad Range, Kodad, Nalgonda District.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a writ or order or direction more particularly one in the nature of a Writ of Mandamus declaring that Chapter-V of the Finance Act, 1994 [Central Act] as amended by Finance Act, 1997 and the retrospective and validation provisions in Section 116 & 117 of the Finance Act, 2000 and the Section 158 of Finance Act 2003 in so far as they seek to levy service tax on amounts paid to Goods Transport Operators for carriage of goods by road as ultra vires Entry 56 of List-II of the VII Schedule to Constitution of India and hence unconstitutional; and in any event declare provisions treating entire freight charges as liable to service tax as discriminatory and unconstitutional; and consequently declare that the Petitioner is not liable to pay any service tax as user of Goods Transport Service during the period 16.11.1997 to 2.6.1998.

Counsel for the Petitioner:MR.P.SRINIVASA REDDY

Counsel for the Respondents : MR.ARAJASHEKAR REDDY (SC FOR CG)

WRIT PETITION NO : 7852 of 2004

Between:

The Sirpur Mills Ltd. Sirpur Kaghaznagar, rep by its Asst. Officer (Liaison), Mr. D. Durga Prasad, S/o. Late D. Rajagopala Rao, aged 41 years, R/o. Hyderabad.

..... PETITIONER

AND

1 The Union of India, rep by its Secretary, Ministry of Finance North Block,

New Delhi.
2 The Central Board of Customs and Central Excise, North Block, New Delhi.
3 The Commissioner of Customs and Central Excise, Basheerbagh,

Hyderabad.
4 The Superintendent (Service Tax), Central Excise, O/o. Asst. Commissioner

of Central Excise, Nizamabad Division, KNAR Estate, 3rd Floor,

Nizamabad - 503 003.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a Writ of Mandamus or any appropriate Writ, order or orders, Direction or Directions declaring the provisions of Section 68, 70 and 71-A of the Finance Act, 2003 requiring the recipient of Goods Transport Services for the period of 16-11-1997 to 02-6-1998 as unconstitutional, illegal and opposed to the law laid down by the Hon'ble Supreme Court and to consequently set aside the demand raised by the 3rd and 4th Respondent.

Counsel for the Petitioner:MR.V.SRINIVAS

Counsel for the Respondents : MR.ARAJASHEKAR REDDY (SC FOR CG)

WRIT PETITION NO : 10184 of 2004

Between:

M/s. Sree Rayalaseema Dutch, Kassenbouw Limited, Gandhiparla,
Kurnool, Kurnool District. Rep. by its General Manager D. Suresh Babu,
S/o. Rama Murthy, aged 49 Years, R/o. Kurnool, Kurnool district.

..... PETITIONER

AND

1 The Union of India, Rep. by its Secretary, Ministry of Finance, North Block,

New Delhi.
2 The Commissioner of Customs and Central Excise, Tirupathi, Chittoor

District.
3 The Deputy Commissioner of Customs and Central Excise, Kurnool

Division, Kurnool.
4 The Superintendent of Central Excise, Range-II, Kurnool, Kurnool District.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue Writ, order or direction, more particularly one in the nature of Writ of Mandamus, declaring the provisions of Sections 68, 70 and 71-A of the Finance Act, 2003 requiring the recipient of Goods Transport Services of 4th page and forwarding agents fort the period 16-07-1997 to 15-10-1998 as unconstitutional, illegal and opposed to the law laid down by the Honourable Supreme Court and to consequently set aside the Notice issued by the 4th respondent vide OC No. 920/2003 dated 04-11-2003.

Counsel for the Petitioner:MR.K.V.UPENDRA GUPTA

Counsel for the Respondents : MR.A.RAJASHEKAR REDDY (SC FOR CG)

The Court made the following :

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COMMON ORDER : (Per Hon'ble Sri Justice Bilal Nazki)

All these Writ Petitions raise common questions of facts and law therefore, are being disposed of by a common order. For the purpose of facts, we give reference to Writ Petition No.1478 of 2004 and also to the counter filed in the same Writ Petition.

The constitutional validity of levy of service tax by the Parliament on fright charges incurred by the petitioner on carriage of goods by road, is challenged. This petitioner had filed earlier, Writ Petition No.950 of 1998 and had questioned the charging provisions on the ground of absence of legislative competence. This Writ Petition was allowed by the Court with a batch, on 05.11.1999, following the judgment of the Hon'ble Supreme Court in *Laghu Udyog Bharathi* [1999(5) JT 352] case, striking down Rule 2(1)(d)(xvii)

relating to payment of service tax by users of clearing and forwarding agents service and users of goods transport service. By Finance Act, 2000, the Parliament amended the provisions for the limited period of 16-7-1997 to 16-10-1998 to enable collection of tax from the service users also and enacted validating provisions. Therefore, the petitioner filed the Writ Petition, questioning the levy of service tax on goods being transported by the petitioners, on the grounds of legislative incompetence and discrimination.

The petitioners in this Writ Petition contend that they are a Public Limited Company engaged in manufacture of sugar and ferroalloys and has its factories at Samalkot and Paloncha. During the course of its business, the petitioners engage trucks for inward and outward movement of goods. The freight charges paid by the petitioner for transporting goods involves use of trucks and for the purposes of use of trucks, the fuel is also arranged by transporters. The act of transport does not merely involve personal services of transporters but also vehicles and fuel. Chapter-V of the Finance Act, 1994 provide for levy of service tax on utilization of transport services by the petitioners. It was amended by Finance Act of 1997 and by virtue of it, service tax of 5% on the amount of freight is charged, which is according to the petitioners, un-constitutional and ultra vires to the legislative powers of the Parliament. It is contended that the provisions are also unreasonable and discriminative and in violation of Article 14 and 19(1)(g) of the Constitution of India. Therefore, the petitioners challenged the constitutional validity of Chapter-V of Finance Act, 1994 as amended by Finance Act, 1997 and Finance Act, 2000 insofar as levy of service tax on persons like the petitioner at the rate of 5%, is concerned.

The respondents in their counter, have stated that the goods, transport operators were brought into the Service Tax net with effect from 16.7.1997 and the service tax was required to be paid by the users of the transport services. The levy imposed on users of transport services was questioned before the Supreme Court by

various writ petitions. The Supreme Court in its judgment in *Laghu Udyog Bharathi and others Vs. Union of India* [1999 (6) SCC 418], held that levy of Service Tax on users of goods transport operator services, was illegal. In order to validate the imposition of the said tax and also in furtherance of rectifying the defects in law pointed out by the Supreme Court, the Parliament amended Sections 68 and 70 retrospectively and a new Section 71-A was inserted in Finance Act of 1994 to validate the collection of Service Tax from the users of goods transport operator services for the period from 16.07.1997 to 01.06.1998. These amendments were also challenged before the Supreme Court in Writ Petition No.411 of 2000 in the case of *Associated Cement Company Ltd. Vs. Union of India and another*, wherein the legality of Sections 116 and 117 of the Finance Act, 2000, was challenged. The Supreme Court did not grant stay in respect of payment of tax, but extended the time to file returns till 28.11.2003. Further amendments however, were carried out in Finance Act, 2003 in order to validate the imposition of tax from 16.7.1997 to 02.6.1998 and to remove the basic infirmities in law pointed out by the Supreme Court in *Laghu Udyog Bharathi Vs. Union of India* case.

The arguments, which have been made by the learned Counsel for the petitioners, mainly revolve round the legislative competence of the Parliament to legislate on matters, which according to the petitioners, exclusively fall within the domain of State Legislature. Before going to this argument, it is necessary to reproduce the amendments that were affected to the Finance Act in 2003. Section 68 in 2003 Act reads as under;

> *"**Section 68**: Payment of service tax –*
>
> *Provided that –*
>
> i. *in relation to services provided by a clearing and forwarding agent, every person who engages a clearing and forwarding agent and by whom remuneration or commission (by whatever name called) is paid for*

such services to the said agent for the period commencing on and from the 16th day of July, 1997 and ending with the 16th day of October, 1998; or

ii. *in relation to services provided by goods transport operator, every person who pays or is liable to pay the freight either himself or through his agent for the transportation of goods by road in a goods carriage for the period commencing on and from the 16th day of November, 1997 and ending with the 2nd day of June, 1998, shall be deemed to be a person liable to pay service tax, for such services provided to him, to the credit of the Central Government."*

Section 71-A reads as under;

*"**Section 71-A**: "Notwithstanding anything contained in the provisions of Section 69 and 70, the provisions thereof shall not apply to a person referred to in the proviso to sub-section (1) of Section 68 for the filing of return in respect of service tax for the respective period and service specified therein and such person shall furnish return to the Central Excise Officer within six months from the day on which the Finance Bill, 2003 receives the assent of the President in the prescribed manner on the basis of the self assessment of the service tax and the provisions of Section 71 shall apply accordingly."*

In Finance Act of 2000, Section 117 lays down;

*"**117. Validation of certain action taken under Service Tax Rules:-***

Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, sub-clauses (xii) and (xvii) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994 as they stood immediately before the commencement of the Service Tax (Amendment) Rules, 1998 shall be deemed to be valid and to have always been valid as if the said sub-clauses had been in force at all material times and accordingly,--

i. *any action taken or anything done or purported to have been taken or done at any time during the period commencing on and from the 16th day of July,*

1997 and ending with the day, the Finance Act, 2000 receives the assent of the President shall be deemed to be valid and always to have been valid for all purposes, as validly and effectively taken or done;

ii. *any service tax refunded in pursuance of any judgment, decree or order of any court striking down sub-clause (xii) and (xvii) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994 before the date on which the Finance Act, 2000 receives the assent of the President shall be recoverable within a period of thirty days from the date on which the Finance Act, 2000 receives the assent of the President, and in the event of non-payment of such service tax refunded within this period, in addition to the amount of service tax recoverable, interest at the rate of twenty-four per cent, per annum shall be payable, from the date immediately after the expiry of the said period of thirty days, till the date of payment.*

Explanation:- For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."

The argument is that the Finance Act, 1994 as amended by Finance Act, 1997, Finance Act, 2000 and Finance Act, 2003, are ultra vires on the ground that taxes on goods and passengers carried by road or inland waterways is within the exclusive domain of the State legislature. Entry 56 in List-II of Schedule-VII of the Constitution reads as, *"Taxes on goods and passengers carried by road or on inland waterways"* and Entry 89 in List-I of Schedule-VII reads as, *"Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights".* The contention is that by Entry 56 in List-II, imposition of taxes on goods and passengers carried by road or by inland waterways, is in the exclusive domain of the State legislature, whereas in terms of Entry 89 in List-I, taxes on goods or passengers carried by railways, sea or air, is in the exclusive domain

of the Parliament. Since the tax imposed by the impugned Acts is tax on passengers and goods carried by road, it is outside the scope of Parliament. There cannot be any dispute that tax can be levied on goods and passengers by the State legislature alone, if they are carried by road or inland waterways. But in the present Writ Petitions, the main question is whether the service tax, which is imposed by the impugned legislations, is tax on goods and passengers.

The contention of the respondents is that the tax levied by the Parliament is not tax on goods or passengers, but is tax on providing of service and as such, is within the domain of the Parliament. These arguments have been advanced not for the first time before this Court, but have received the attention of various Courts including the Supreme Court. We have incorporated hereinabove Sections 68 and 71-A of the Finance Act, 2003, which is the latest. Those sections make it clear that tax levied is not on goods or person, but is tax on service. The judgments where these questions were considered and on which the Counsel for petitioners relied upon, are;

(1) *Laghu Udyog Bharati & Another V. Union of India & Others*

In this case, Rules 2(xii) and 2(xvii) of the Service Tax Rules, as amended in 1997 were subject matter of dispute before the Hon'ble Supreme Court. These rules had been challenged on the ground that the said sub-rules were contrary to the provisions of Sections 65 and 66 of the Finance Act of 1994, whereby Service Tax was sought to be levied by the Parliament. For the first time, Service Tax was imposed by Finance Act of 1994. The tax was proposed on three types of services which were rendered. By Finance Act of 1997, the Parliament sought to widen the net and it amended certain provisions in the Act. The amendment in the Act necessitated amendments in the Rules as well. The Supreme Court considered the import of Sections 65 and 66 of the Finance Act of 1997 and the Rules, which were under challenge before the Supreme Court and came to the conclusion that the Rules were ultra vires to the provisions of the Act. In paras 13 and 14, it held;

*"**13**. Section 94 gives the Central Government power to make the rules. These rules are to be made for carrying out the provisions of the chapter. The chapter relates to taxing the services which are provided. The tax is on the value of the services and it is only the person providing the service who can be regarded as an assessee. The rules, therefore, cannot be so framed which do not carry out the purpose of the chapter and cannot be in conflict with the same.*

***14**. We have no hesitation in holding that the provisions of Rule 2(d)(xii) and (xvii), insofar as they make persons other than the clearing and forwarding agents or the persons other than the goods transport operator as being responsible for collecting the service tax, are ultra vires the Act itself. The said sub-rules are accordingly quashed."*

So, this was not a judgment in which the Supreme Court had gone to consider whether levying of Service Tax of the nature which has been levied, was within the competence of the Parliament or not. However, to remove the defect as pointed out by the Supreme Court, the Act itself was amended and validation provisions were also enacted.

(2) *Khyerbari Tea Co. Ltd., & another Vs. State of Assam & others*

An Act [Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act (10 of 1961)], enacted by Assam State legislature, was subject matter of controversy in this judgment. It is a judgment of a Constitutional Bench of the Supreme Court. The relevant provision for the purpose of present case would be Section 3 (1) and (2). They had been reproduced in the judgment by the Supreme Court in Para 15 of the judgment as under;

*"**(1)** Subject to the provisions of this Act, there shall be levied a tax on (a) manufactured tea and (b) jute in bales carried by motor vehicle, cart, trolley, boat, animal and human agency or any other means except railways and airways in such manner and in respect of such period and at such rate as specified in the Schedule.*

(2) *Such tax levied on manufactured tea shall be realised from the producer and that levied on jute shall be realised from the dealer;*

Provided that where tea is sold at the factory premises, the producer shall be liable for realisation of tax from the purchaser with effect from such date as the Government may, by notification appoint, for the carriage of such tea as provided in this section and the producer shall be liable for the payment of such tax notwithstanding, the fact that the tea is not carried by the producer."

The argument which was advanced and the answer given by the Supreme Court, can be found in Para 50 of the judgment, which is reproduced as under;

*"**50**. That leaves only one more point urged by Mr. Mazumdar to be considered. Mr. Mazumdar contends that the tax is invalid for the reason that tea which is one of the objects taxes has been covered by the Central Tea Act (Act No. XXIX of 1953) and he argues that since the Central Act has been passed by reference to the relevant Entry in List I in the Seventh Schedule, it is not open to the State Legislature to pass a taxing statute in respect of tea. It is true that the Tea Act has made several provisions in regard to tea and has constituted a Board to deal with the problems enumerated in the other provisions of the said Act, but one has merely to glance through the relevant provisions of the Tea Act to realise that the scope and purpose of the said Act is entirely different from the scope and purpose of the taxing Act with which we are concerned. The pith and substance of the taxing statute is the levy of a tax on tea which is carried in the State of Assam and the right to levy such a tax cannot be said to have been taken away merely by the fact that a Tea Act had been passed by the Central Legislature which is referable to the relevant Entry in List I of the 7th Schedule. The power to levy a tax which has been conferred on the State Legislature by Entry 56 cannot, therefore, be said to be controlled by the Tea Act in question. It would be noticed that List I does not contain any Entry by which the Central Legislature can pass an Act levying a tax on goods carried which can be said to control Entry 56 in List II. That being so, we must hold that there is no substance in the argument that the State Legislature has no power to levy a tax on tea which is carried over a part of the area of the State of Assam."*

The argument of the learned Counsel for the petitioners is that the Constitutional Bench of the Supreme Court had held that List-I does not contain any Entry by which the Central legislature can pass an Act levying tax on goods covered in terms of Entry 56 in List-II. Since the impugned provisions levied tax on goods carried in terms of Entry 56 of List-II, the impugned legislations were invalid. It is contended by learned Counsel for petitioners that the matter stands concluded by this Constitutional Bench Judgment of the Supreme Court. There is no dispute that in this case, the tax was levied on movement of goods and therefore, the Supreme Court found it to be within the legislative competence of the State legislature, as the goods squarely fell within Entry 56 of List-II.

(3) *M/s.Sainik Motors, Jodhpur & Others Vs. State of Rajasthan.*

In this case, the Constitutional validity of Rajasthan Passengers and Goods Taxation Act (18 of 1959) was challenged. The Act was passed in 1959 for levying tax on passengers and goods carried by road, in motor vehicles. The power to enact such law was claimed under Entry 56 of the State List in Schedule-VII. Section 3 was the charging section in the Act. The main argument before the Supreme Court was that under the guise of taxing passengers and goods, the State was, as a matter of fact, imposing a tax on income and as such, was income tax, which was not within the domain of the State legislature. Section 3 was reproduced by the Supreme Court as under;

> *"**3**. **Levy of tax.** - (1) There shall be levied, charged and paid to the State Government a tax on all fares and freights in respect of all passengers carried and goods transported by motor vehicles at such rate not exceeding one-eight of the value of the fare or freight, in the case of cemented, tarred, asphalted, metalled, gravel and kankar roads and not exceeding one-twelfth of such value in other cases, as may be notified by the State Government*

from time to time subject to a minimum of one naya paisa in any one case, the amount of tax being calculated to the nearest naya paisa.

Explanation. - When passengers are carried and goods are transported by a motor vehicle, and no fare or freight has been charged, the tax shall be levied and paid as if such passengers were carried or goods transported at the normal rate prevalent on the route.

***(2)** Where any fare or freight charged is a lump sum paid by a person on account of a season ticket or as subscription or contribution for any privilege, right or facility which is combined with the right of such person being carried or his goods transported by a motor vehicle without any further payment or at a reduced charge, the tax shall be levied on the amount of such lump sum or on such amount as appears to the prescribed authority to be fair and equitable having regard to the fare or freight fixed by a competent authority under the Motor Vehicles Act, 1939 (Central Act 4 of 1939).*

***(3)** Where passengers are carried or goods transported by a motor vehicle from any place outside the State to any place in the State, or from any place within the State to any place outside the State, the tax shall be payable in respect of the distance covered within the State at the rate laid down in sub-section (1) and shall be calculated on such amount as distance covered in the State bears to the total distance of the journey :*

Provided that where passengers are carried or goods transported by a motor vehicle from any place within the State to any other place within the State through the intervening territory of another State, the tax shall be levied on the full amount of the fare or freight payable for the entire journey and the owner shall issue a single ticket or receipt, as the case may be accordingly."

Therefore the petitioners contended in that case that what they were receiving by way of freights or fares, was their income and the tax levied was on their income. The Supreme Court considered this argument in para 9 of the judgment as under;

*"**9**. The first - and the main - contention is that the Act in the guise of taxing passengers and goods, taxes really the income of the petitioners, or at any rate, fares and freights, and is thus unconstitutional. It is argued that the tax is borne by the operators because of competition with Railways. That the petitioners are required to bear the tax themselves to stand competition with the Railways is a matter of policy, which the petitioners follow and is not something which flows inevitably from the provisions of the Act. We do not agree that the Act, in its pith and substance, lays the tax upon income and not upon passengers and goods. Section 3, in terms, speaks of the charge of the tax "in respect of all passengers carried and goods transported by motor vehicles", and though the measure of the tax is furnished by the amount of fare and freight charged, it does not cease to be a tax on passengers and goods. The Explanation to S. 3(1) lays down that even if passengers are carried or goods transported without the charge of fare or freight, the tax has to be paid as if fare or freight has been charged. This clearly shows that the incident of the tax is upon passengers and goods, though the amount of the tax is measured by the fares or freights. A similar argument was not accepted by the Madras High Court in Mathurai Pillai v. State of Madras, ILR (1954) Mad 867 : (AIR 1954 Mad 569), and the same view was expressed in Atma Ram Budhia v. State of Bihar, ILR 31 Pat 493 : (AIR 1952 Pat 359) (SB). In our opinion, the charging section does not go outside Entry No. 56. The tax is still on passengers and goods, though what it is to be is determined by the amount of fare and freight. It is clear that if the tax were laid on passengers irrespective of he distance traveled by them, it would lead to anomalies if the amount charged be the same in every case. This is additionally clear in the case of goods where the weight, bulk or nature of the goods may be different and a scale of payments must inevitably be devised. Though the tax is laid on passengers and goods, the amount varies in the case of passengers according to the distance travelled, and in the case of goods because the freight must necessarily differ on account of weight, bulk and nature of the goods, transported. The tax, however, is still a tax on passengers and goods, and the argument that it is not so, is not sound."*

The learned Counsel for petitioners submitted that since the Supreme Court held in this case that although income was taken into consideration for levy of rate of tax, the tax was still on passengers and goods, though the amount of tax may be determined by the amount of fare or freight. Therefore, in the present case also, even if

the impugned legislation terms the tax as the tax on services, it remains tax on movement of goods, for which legislation can only be made by the State legislature.

(4) *A.S.Karthikeyan & Others Vs. State of Kerala & Another.*

In this Case also, the Supreme Court was considering a similar question, which was considered in the case of *M/s.Sainik Motors* (3rd supra). In para 3 of the judgment, the Supreme Court stated the questions, which were to be answered and they read as under;

> "***3***. *The questions which fall for consideration in these matters are these.*
>
> *First, does Act 18 of 1971 levy a tax on the income of operators?*
>
> *Second, is the retrospective validation of levy and collection of taxes by Act 18 of 1971 legal?*
>
> *Third, is it competent to the legislature to amend S.43 of the Motor Vehicles Act, 1939 called the 1939 Act by Act 34 of 1971 to include retrospectively tax within fare."*

Sub-Section (1) of Section 3 of the Act was reproduced by the Supreme Court in para 22 of the judgment as under;

> *"**22**. The two new sub-sections introduced to Section 3 by Act 18 of 1971 are first that the tax levied under sub-section (1) shall be paid by the passengers or the consignors of the goods as the case may be to the operators along with the fares or freights payable to the operators of the stage carriages or the goods vehicles. The second introduction is that the operator shall be liable to pay the tax levied under sub-section (1) on all passengers luggage or goods carried by stage carriages and on all goods carried by goods vehicles of which he is the operator to the Government in the manner provided in this Act."*

There was also a validity provision, which was reproduced in para 23 of the judgment as under;

> *"**23**. The other provision in Act 18 of 1971 is validating section which is as follows:*

"Notwithstanding any judgment decree or order of any court, all taxes levied or collected or purported to have been levied or collected under the Principal Act before the date of commencement of this section shall be deemed to be and to have always been levied or collected in accordance with law as if Section 3 of the principal Act as amended by this Act was in force at all material times when such tax was levied or collected, and no such levy or collection shall be called in question on the ground that it was without authority of law, and all taxes so levied or purported to have been levied but not collected may be collected in accordance with the provisions of the principal Act as amended by this Act.

Provided that nothing in this Act shall render any person liable to be convicted of any offence in respect of anything done or omitted to be done by him before the 5th day of January 1970 if such act or omission was not an offence under the principal Act before the aforesaid date but for the provisions of this Act."

The argument was same that the tax was not being imposed on passengers or goods, but was a tax on the income of operators. And that argument was dealt by the Supreme Court in para 28 in the following terms;

*"**28**. The question whether the statutes, viz, Act 25 of 1963 and Act 18 of 1971 impose a tax on passengers and owners of goods or is a tax on the income of operators has been rightly held by the Kerala High Court in Thomman case, ILR (1968) 2 Ker 153 = (AIR 1969 Ker 130) (supra) and this case to be a tax on passengers and goods. This Court in Sainik Motors, Jodhpur v. State of Rajasthan (1962) 1 SCR 517 = (AIR 1961 SC 1480) construed the Rajasthan Passengers and Goods Taxation Act, 1959 and held that the incidence of the tax was upon passengers and goods and not upon the income of the operators of stage carriages though "the measure of the tax is furnished by the amount of fare and freight charged". The power to enact such legislative measure is derived from Entry 56 of the State List. The Entry provides "taxes on goods and passengers carried by road or on inland waterways". In Sainik Motors case (supra) Section 3 provided "there shall be levied, charged and paid to the State Government a tax on all fares and freights in respect of passengers carried and goods transported by motor vehicles at such rates which are thereafter set out". Section 4 in Sainik Motors case (supra) provided that the*

"tax should be collected by the owner of the motor vehicles and paid to the State Government in the prescribed manner". Though there is no comparable provision in the present case to Section 4 in Sainik Motors case (supra) as to method of collection of tax the various provisions like levy and payment before amendment of Section 3 and levy and collection after amendment of that section, composition of tax in Section 4, submission of return in Section 5, procedure where no payment is made in Section 7 fares and freights escaping assessment in Section 8, penalty for non-payment of tax in Section 9 indicate that the tax is on passengers and owners of goods and the operators collect the tax. It is obvious that when passengers and owners of goods pay the tax the Government requires an agency to collect such tax because these taxes are payable to the Government. The operators of stage carriage and public carriers are agents of the Government to collect these taxes. The composition of tax which is allowed to operators also shows that it is a tax on passengers and owners of goods and the composition is a convenient mode of payment by operators who collect the tax."

In para 43, the Supreme Court laid down;

*"**43**. The contention of the operators is fallacious for these reasons. No tax is imposed or collected under Act 34 of 1971. The tax is imposed by Act 25 of 1963. The character as well as incidence of the tax is determined by Act 25 of 1963. The machinery for collection of the tax which was implicit in Act 25 of 1963 was made explicit by Act 18 of 1971. The State Government under Chapter IV of the Motor Vehicles Act, 1939 having regard to various factors mentioned in Section 43(1) of the 1939 Act issues directions to the State Transport Authority relating to the fixing of fares and freights including the maximum and minimum in respect thereof for stage carriages, contract carriages and public carriers. The provisions of Act 34 of 1971 are that while fixing the fares, the Government may take into account the tax, if any, imposed on the passengers and that such fares may be inclusive of the tax payable by the passengers or consignors of goods to the operators under any law dealing with the matter. Under Section 44 of the 1939 Act the State Transport Authority shall give effect to the directions issued by the State Government under Section 43 of*

the Act. Fare could be fixed either exclusive or inclusive of tax. The State Government fixed the fare on 1 July, 1963 after taking into account the element of tax on passengers and goods imposed by Act 25 of 1963. The operators in collecting fare from passengers in fact collected the tax due from passengers under act 25 of 1963 along with the fare. Section 43 (1A) of the Motor Vehicles Act, 1939 was, therefore, introduced with retrospective effect to clarify the factual basis. There was neither imposition of any new tax by Act 34 of 1971 nor was there any alteration of the character of the tax which had already been imposed. In the present case, the principal Act 25 of 1963 levied the tax. Acts 18 and 34 of 1971 were for the purpose of dispelling the doubts expressed in Thomman case, ILR (1968) 2 Ker 153 = (AIR 1969 Ker 130) (supra).”

In the light of these judgments, there cannot be any dispute that the State has the power to impose tax in terms of Entry 56 of List-II of Schedule-VII on movement of goods and passengers through roadways and inland waterways. And in all these cases which have been referred to hereinabove, the Supreme Court came to the conclusion that in pith and substance, the tax was on movement of goods and passengers and was not tax on income. The learned Counsel for petitioners contend that the impugned legislations also basically levy tax on movement of goods therefore, applying the tests laid down by the Supreme Court in the judgments referred to hereinabove, it must be held that the impugned legislations are outside the competence of Parliament.

The learned Counsel for respondents, however, submits that the tax, as a matter of fact, is not on movement of goods, but it is tax on providing of service of movement of goods. They referred to a judgment reported in *State of Karnataka & Others Vs. Drive-In Enterprises*. Section 2(i)(v) of the Karnataka Entertainments Tax Act, 1958 was the subject matter of controversy before the Supreme Court. This provision was struck down by the Karnataka High Court as being beyond the legislative competence of the State legislature. The appeal was taken to the Supreme Court. The Writ Petitioner before the High Court had a drive-in-theatre, which was a cinema

theatre in an open area. Viewers could be admitted to see the cinema while sitting in their motor cars and they were allowed to take their cars inside the theatre. The drive-in-theatre has also an auditorium, wherein persons without cars could view the film exhibited therein either standing or sitting. The persons who were admitted to view the film exhibited in the auditorium were required to pay Rs.3/- for admission. However, if a person desired to take his car inside the theatre with a view to see the film while sitting in the car, he was required to pay further sum of Rs.2/- to the proprietor of the drive-in-theatre. The case of the writ petitioner before the High Court was that the State, in addition to charging entertainment tax on the persons who were entertained, levied entertainment tax on admission of cars as well and it was beyond the scope of Entry 62 of List-II of Schedule-VII. The High Court accepted this argument, but the Supreme Court did not accept the contention of the Writ Petitioner. Entry 62 reads, "*Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.*" The argument was that it could not be claimed that cars and motor vehicles could also be entertained therefore, an entertainment tax of Rs.2/-, which was charged in excess to those who were sitting in their cars while watching the cinema was, as a matter of fact, tax on cars and motors, which could, by no stretch of imagination, be entertained. It was also contended that vehicle was not a person entertained and therefore the tax was bad. The Supreme Court held,

> *"We are, therefore, of the view that in pith and substance the levy is on the person who is entertained. Whatever be the nomenclature of levy, in substance, the levy under heading "admission of vehicle" is a levy on entertainment and not on admission of vehicle inside the drive-in-theatre. As long as in pith and substance the levy satisfies the character of levy, i.e. "entertainment", it is wholly immaterial in what name and form it is imposed. The word "entertainment" is wide enough to comprehend in it, the luxury or comfort with which a person entertains himself. Once it is found there is a nexus between the legislative competence and subject of taxation, the levy is justified and valid. We, therefore, find that the State Legislature was competent to enact sub-clause (v) of clause (i) of Section 2 of the Act. We accordingly hold that the impugned levy is valid."*

The learned Counsel for respondents also relied on a judgment reported in *Federation of Hotel & Restaurant V. Union of India & Others*. This is a judgment of Constitutional Bench of Five Judges. Challenge in this case was to the Expenditure Tax Act 1987, which envisaged a tax at 10% advolerm on chargeable expenditure incurred in the class of hotels wherein room charges for any unit of residential accommodation were Rs.400/- per day per individual. The challenge to the Act was on the ground of lack of legislative competence and of violation of rights under Articles 14 and 19. Union of India defended the enactment on the strength of Entry 97 of List-I of Schedule-VII. In Para 12, the Supreme Court held,

> *"**12**. We have bestowed our careful consideration to these rival contentions. The principal question is whether the tax envisaged by the impugned law is within the legislative competence of the Union Parliament. In that sense, the constitutionality of the law becomes essentially a question of power which in a federal constitution, unlike a legally omnipotent legislature like the British Parliament, turns upon the construction of the entries in the legislative lists. If a legislature with limited or qualified jurisdiction transgresses its powers, such transgression may be open, direct and overt, or disguised, indirect and covert. The latter kind of trespass is figuratively referred to as "colourable legislation", connoting that although apparently the legislature purports to act within the limits of its own powers yet, in substance and in reality, it encroaches upon a field prohibited to it, requiring an examination, with some strictness, the substance of the legislation for the purpose of determining what is that the legislature was really doing. Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the Courts, however difficult it may be, to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each legislature and to define, in the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two provisions must be read together, and the language of one interpreted, and, where necessary modified by that of the other.*
>
> *The Judicial Committee in Prafulla Kumar Mukherjee v. Bank of Commerce, (1945 FCR 179)* referred to with approval the*

*following observations of Sir Maurice Gwyer C. J. in Subrahmanyan Chettiar's case (AIR 1947 FC 47 at p. 51): * Or 1947 F.C.R. 28 = AIR 1947 PC 60....Ed.*

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that."

This necessitates as an "essential of federal Government the role of an impartial body, independent of general and regional Governments", to decide upon the meaning of decision of powers. The Court is this body."

In Para 14, it held;

14. In Lefroy's 'Canada's Federal System' the learned author referring to the "aspects of legislation" under Sections 91 and 92 of the Canadian Constitution i.e., British North America Act, 1867 observes that "one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of legislative power is that subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power. Learned author says:

"..... that by 'aspect' must be understood the aspect or point of view of the legislator in legislating the object, purpose, and scope of the legislation that the word is used subjectively of the legislator, rather than objectively of the matter legislated upon."

In Union Colliery Co. of British Columbia Ltd. v. Bryden (See 1899

AC 580 at P. 587) Lord Haldane said:

"It is remarkable the way this Board has reconciled the provisions of Section 91 and Section 92, by recognizing that the subjects which fall within Section 91 in one aspect, may, under another aspect, fall under Section 92."

Indeed, the law 'with respect to' a subject might incidentally 'affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in Governor General in Council v. Province of Madras, 1945 FCR 179 at p. 193 : (AIR 1945 PC 98 at p. 101) in the context of concepts of Duties of Excise and Tax on Sale of Goods said:

"..... The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale....."

In Para 49, Justice Ranganathan, as his Lordship then was, concurring with Justice Venkata Chalaiah, who wrote the judgment for other learned Judges, held;

*"**49**. In the light of the above entries and decisions, 1 think that the learned Attorney General is right in urging that, merely because the 1987 Act as well as the State Acts levy taxes which have ultimate impact on persons who enjoy certain luxuries, the pith and substance of both cannot be considered to be the same. The object of a tax on luxury is to impose a tax on the enjoyment of certain types of benefits, facilities and advantages on which the legislature wishes to impose a curb. The idea is to encourage society to cater better to the needs of those who cannot afford them. For instance, a luxury tax may, to cite a catchy example, encourage construction of " janata" hotels rather than five star hotels. Such a tax may be on the person offering the luxury or the person enjoying it. It may be levied on the basis of the amount received for providing, or the amount paid for or expended for*

enjoying, the luxury. Conceivably, it could be on different bases altogether. The object of an expenditure tax - and, that, conceptually, there can be an expenditure tax is borne out by Azam Jah's case (AIR 1972 SC 2319) (supra) - is to discourage expenditure which the legislature considers lavish or ostentatious. The object of the first would be to discourage certain types of living or enjoyment while that of the second would be to discourage people from incurring expenditure unproductive or undesirable channels. If a general Expenditure Tax Act, like that of 1957, had been enacted, no challenge to its validity could have been raised because it incidentally levied the tax on expenditure incurred on luxuries. The fact that there will be some overlapping then or that here there is a good deal of such overlapping, because the States have chosen to tax only some types of luxuries and the Centre to tax, at least for the time being, only expenditure which results in such luxuries, should not be allowed to draw a curtain over the basic difference between the two categories of imposts. For instance, if the conflict alleged had been between the present State Acts and an Act of Parliament taxing expenditure incurred in the construction of theatres or the maintenance of race horse establishments or the like, there would have been no overlapping at all and the pith and substance of the central tax could well be described as "expenditure" and not "luxuries". This distinction is not obliterated merely because of the circumstance that both legislatures have chosen to attack the same area of vulnerability, one with a view to keep a check on 'luxuries' and the other with a view to curb undesirable 'expenditure'. For these reasons, I agree with my learned brother Venkatachaliah, J. that the validity of the three impugned enactments has to be upheld and these writ petitions and appeals dismissed."

The learned Counsel for respondents further contends that the matter is concluded by a Supreme Court judgment reported in *Tamilnadu Kalyana Mandapam Association Vs. Union of India and others*, which is direct on the point. Same provisions which are impugned before us, were impugned in this case. The appellant before the Supreme Court was an Association of Kalyanamandapams. The owners of Kalyanamandapams let out Mandapams and premises to the clients. In addition to providing of Kalyanamandapams, the Mandap keepers also provide other facilities such as catering, electricity, water etc., to their clients.

Before going to this judgment, some other provisions of Finance Acts are necessary to be mentioned.

Sections 65 (16), 65 (17), 65(41)(m) and 66(3) of Finance Act 1998 reads as under;

> ***Section 65(16)*** *: ""goods carriage" has the meaning assigned to it in Clause (14) of Section 2 of the Motor Vehicles Act, 1988 (59 of 1988)".*
>
> ***Section 65(17)*** *: ""goods transport operator" means any commercial concern engaged in the transportation of goods but does not include a courier agency."*
>
> ***Section 65(41)(m)*** *: ""Taxable service" means any service provided (a) xx xx xx (b) xx xx (c) xx xx xx (m) to a customer, by a goods transport operator in relation to carriage of goods by road in a goods carriage."*
>
> ***Section 66(3):*** *"With effect from the date notified under Section 84 of the Finance Act, 1997 (26 of 1997), there shall be levied a service tax at the rate of five per cent of the value of the taxable services referred to in sub-clauses (g), (h), (i), (j), (k), (l), (m), (n) and (o) of Clause (41) of Section 65 which are provided to any person by the person responsible for collecting service tax."*

Sections 65(7), 65(18-A) and 65(18-B) of Finance Act, 2000 reads as under;

> *"**Section 65(7)**: "assessee" means a person liable for collecting the service tax and includes –*
>
> i. *his agent; or*
>
> ii. *in relation to services provided by a clearing and forwarding agent, every person who engages a clearing and forwarding agent and by whom remuneration or commission (by whatever name called) is paid for such services to the said agent; or*
>
> iii. *in relation to services provided by a goods transport*

operator, every person who pays or is liable to pay the freight either by himself or through his agent for the transportation of goods by road in a goods carriage."

–

Section 65(18-A) *: ""goods carriage" has the meaning assigned to it in Clause (14) of Section 2 of the 25 Motor Vehicles Act, 1988."*

Section 65 (18-B) *: ""goods transport operator" means any commercial concern engaged in the transportation of goods but does not include a courier agency."*

For the purpose of the present case, 'taxable service' is defined under Section 65(48)(ma) of the Finance Act, 2000, which reads as under;

–

Section 65(48)(ma) *: (taxable service means any service provided): "to a customer, by a goods transport operator in relation to carriage of goods by road in a goods carriage."*

In the case before the Supreme Court (7 supra), the bone of contention was interpretation of 'taxable service', as defined under Clause 41(p) of Section 65 of the Finance Act, 1994, which was reproduced by the Supreme Court as under;

*"**(41)(p):** 'taxable service' means any service provided to a client, by a mandap keeper in relation to the use of a mandap in any manner including the facilities provided to the client in relation to such use and also the services, if any, rendered as a caterer."*

The main arguments before the Supreme Court in this case were – (1) the tax, which was imposed, was covered by Entry 54 of List-II of Schedule-VII. Entry 54 reads as, *"Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A*

of List-I." (2) the tax on land and buildings was covered by Entry 49 of List-II of Schedule-VII, which reads as, *"Taxes on land and buildings."* And (3) taxes on luxuries was covered by Entry 62 of List-II of Schedule-VII, which reads as, *"Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling."* Finally the Supreme Court held,

> *"A tax on services rendered by mandap keepers and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire purchase activities. Section 65, clause (41) sub-clause (p) of the Finance Act, 1994, defines the taxable services (which is the subject matter of levy of service tax) as any service provided to a customer by a mandap-keeper in relation to use of a mandap in any manner including the facilities provided to a customer in relation to such use also the services, if any, rendered as a caterer. The nature and character of this service tax is evident from the fact that the transaction between a mandap keeper and his customer is definitely not in the nature of a sale of hire purchase of goods. It is essentially that of providing a service. In fact, as pointed out earlier, the manner of service provided assumes predominance over the providing of food in such situations which is a definite indicator of the supremacy of the service aspect. The Legislature in its wisdom noticed the said supremacy and identified the same as a potential region to collect indirect taxes. Moreover, it has been a well established judicial principle that so long as the legislation is in substance, on a matter assigned to a legislature enacting that statute, it must be held valid in its entirety even though it may trench upon matters beyond its competence. Incidental encroachment does not invalidate such a statute on the grounds that it is beyond the competence of the Legislature (Prafulla Kumar v. Bank of Commerce, AIR 1947 PC 60). Article 246(1) of the Constitution specifies that Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution. As per article 246(3), the State Government has exclusive powers to make laws with respect to the matters enumerated in List II (State List). In respect of the matters enumerated in List III (Concurrent List) both Parliament and State Government have powers to make laws. The service tax is made by Parliament under the above residuary powers."*

The Supreme Court held that the service tax on mandaps was not in fact tax on land, nor was an entertainment tax, but was tax essentially on service and could be attributed to the residuary power of the Parliament. In our view, this judgment covers the present controversy on all fours. Though in the present case the contention was that the tax was in fact tax on movement of goods by road and inland waterways, the case before the Supreme Court was that the tax was on land and buildings and also on entertainment. In principle, there is no difference in our view, between the two cases.

It was also contended by some of the Counsels that providing transport would mean – movement of goods, providing of a vehicle, providing the staff like Driver and Conductor and also providing of fuel to the vehicle therefore, the tax could not be levied on such activities. Such activities would not be material, in substance, the tax is levied on providing the service of transportation of goods. Therefore, providing for facilities in order to facilitate the transport of goods would be a factor constituting the service for which the tax is levied.

Though a feeble attempt was also made that the validation provision could not be made in view of Supreme Court Judgment, it was not seriously contested and as a matter of fact, provisions of validation were passed in Finance Act of 2000 and the Finance Act of 2000 has not been challenged in any of the writ petitions. Even otherwise, the Supreme Court had found in the earlier judgments that the rules were ultra vires to the provisions of the Act. Therefore, in our view, there was no impediment for the Parliament to amend the Act itself.

For these reasons, we do not find any merit in these Writ Petitions, which are accordingly dismissed.

_____

BILAL NAZKI, J

27th January 2005.

S. ANANDA REDDY, J

N.B:

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(B/o)

ajr

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One fair copy to the Hon'ble Sri Justice S.Ananda Reddy (For his Lordship's kind perusal).

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4 The Superintendent of Customs & Central Excise, Bhadrachalam Range,

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5 The Superintendent of Central Excise, O/o Superintendent of Central Excise, Kodad Range, Kodada, Nalgonda District.

6 The Commissioner of Customs and Central Excise, Tirupathi, Chittoor

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7 The Deputy Commissioner of Central Excise, Kurnool Division, Kurnool.
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9 The Central Board of Customs and Central Excise, North Block, New Delhi.
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